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No. 08-

IN THE

Supreme Court of the United States

EARL WYCHE,
Petitioner,

v.

FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

WALTER DELLINGER
MATTHEW M. SHORS
(Counsel of Record)
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
Counsel for Petitioner

QUESTION PRESENTED

The police suspected that Earl Wyche might have committed a sexual assault and sought to conduct a saliva swab search in order to test their suspicions. Lacking probable cause or a warrant to conduct the search, the police informed Wyche that he was the suspect in the robbery of a grocery store, and that he could clear himself by consenting to the swab search. In fact, there was no such robbery; the police fabricated that "crime" in order to obtain Wyche's consent. The swab cleared Mr. Wyche in the sexual assault case, but was later used as the sole piece of direct evidence against him in yet another, unrelated criminal case.

The question presented is:

Whether a search conducted solely on the grounds of consent is reasonable under the Fourth and Fourteenth Amendment where the law enforcement officer identified himself and provided a false purpose in order to obtain that consent to search.

PARTIES TO THE PROCEEDING

Petitioner is Earl Wyche, defendant-appellant below.

Respondent is the State of Florida, plaintiff-appellee below.

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Petitioner Earl Wyche respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The decision of the Supreme Court of Florida was issued on July 10, 2008 and is reported at 987 So. 2d 23. (App. 1a.) The decision of the Florida District Court of Appeal was issued on June 20, 2005 and is reported at 906 So. 2d 1142. (App. 1a.) The Circuit Court of the Third Judicial Circuit in and for Columbia County denied the motion to suppress without a written opinion on October 15, 2003. (App. 110a.)

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment and opinion issued on July 10, 2008 by the Florida Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case presents the unsettled, divisive, and recurring question whether police may obtain an individual's consent to search by deceiving the individual as to the true purpose of that search. Petitioner Earl Wyche provided police with a saliva

swab in order to prove to them that he had not taken part in the robbery of a local supermarket. In truth, there had been no such robbery; rather, the police fabricated the crime in order to obtain a saliva swab, which they later used to convict him of a different and unrelated crime.

In a splintered decision involving three dissenting justices and two special concurrences, the Supreme Court of Florida held that the search did not violate the Fourth Amendment. In so doing, the court added to a deep divide in the lower courts over the question whether police may validly obtain consent to search by deceiving an individual as to the search's true purpose. As the California Court of Appeal has explained, this "difficult and unsettled area of Fourth Amendment jurisprudence" has divided the federal and state courts. *People v. Reyes*, 83 Cal. App. 4th 7, 10 (2000). A commentator likewise summed up that "[c]ourts are split on this question." Michael J. Friedman, *Comment, Another Stab at* Schneckloth*: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. L. & Criminology 313, 340 (1998). The Court should grant review to resolve that split on this important and recurring Fourth Amendment question.

A. Factual Background

On December 11, 2001, Wyche was arrested by the Lake City Police Department for an outstanding probation violation. (App. 2a.) At the time, Investigator Clint VanBennekom was investigating a sexual assault case and, for no reason evident in the record, suspected that Wyche had committed the crime. (*Id.* 2a, 55a.)

During a custodial interrogation, Investgator VanBennekom told Wyche that he was suspected of committing a burglary at a local supermarket, and

that he could exonerate himself by consenting to a saliva swab search for DNA comparison to evidence found at the crime scene. (*Id.* 2a.) It is undisputed that Investigator VanBennekom intentionally fabricated the burglary for the express purpose of inducing Wyche to consent to the saliva-swab search. (*Id.* 55a.) Wyche, knowing he was innocent of the fictitious burglary, consented to the bodily search. An analysis of the swab exonerated Wyche from the sexual assault. (*Id.* 2a.)

At around that same time, another member of the Lake City Police Department, Investigator Joseph Moody, was investigating an unrelated burglary case involving a local gift boutique store known as the Pink Magnolia. (*Id.*) While investigating that crime, Investigator Moody received an anonymous telephone call indicating that Wyche was in the north end of Lake City attempting to sell jewelry. (*Id.* 53a) When police attempted to corroborate the tip, they confirmed that Wyche was neither on the north end of Lake City nor attempting to sell jewelry. (*Id.*) As a result, the trial court later excluded the anonymous phone call from evidence. (*Id.* 53a-54a.)

Nevertheless, the anonymous phone call led Investigator Moody to suspect that Wyche had committed the Pink Magnolia burglary. Investigator Moody had collected samples of blood scattered near the front door of the store, where the perpetrator had broken a window to secure entry, and behind the cash register. (*Id.* 52a.) Even after Wyche was cleared in the sexual assault case, therefore, Investigator VanBennekom transferred the saliva swabs to Investigator Moody, who tested the swabs for DNA comparison to the blood recovered from the Pink

Magnolia. The results disclosed a match, and Mr. Wyche was charged in the burglary. (*Id.* 57a-58a.)

B. Proceedings Below

1. Wyche filed a motion to suppress the saliva-swab search before the trial court, arguing that the search was conducted in violation of the Fourth Amendment. (App. 3a.) The court denied Wyche's motion without a written opinion. (*Id.* 110a-111a.)

At trial, over Wyche's objection, the State introduced the DNA test results to connect Mr. Wyche to the blood spots found in the Pink Magnolia. Indeed, those test results were the key evidence offered against Wyche. The police did not recover any fingerprints, call any eye-witnesses, or link the stolen jewelry to Wyche in any respect. (*Id.* 53a.) Accordingly, Wyche's defense centered on answering the results of the DNA test. Wyche testified in his defense that he was a day laborer who had previously performed yard work at the Pink Magnolia on several occasions. (*Id.* 52a.) Wyche testified that while pulling weeds on one of those occasions, he cut his hand and entered the Pink Magnolia to request a pair of gloves. (*Id.*) On October 15, 2003, the jury convicted Mr. Wyche of the burglary, and the trial court imposed a ten-year sentence and a five-year term of probation. (*Id.* 69a.)

2. The First District Court of Appeal of Florida affirmed the trial court's decision on Mr. Wyche's motion to suppress and held that the search was reasonable under the Fourth Amendment. The court acknowledged, however, that its decision conflicted with a competing decision of Florida's Fourth Circuit Court of Appeal in *State v. McCord*, 833 So. 2d 828 (Fla. 4th D.C.A. 2002), and thus certified its decision for review by the Supreme Court of Florida.

In *McCord*, police officers investigating a series of robberies suspected the defendant, who was in county jail on unrelated charges. An investigator told the defendant that he was suspected in a rape case and that DNA evidence could exclude him from the rape investigation if he would consent to a saliva swab. Unkown to the defendant, the investigator had fabricated the rape case. McCord provided a saliva sample, which police matched to blood recovered at the scene from one of the robberies. The trial court granted McCord's motion to suppress on Fourth Amendment grounds, and the Fourth District Court of Appeals affirmed. *McCord*, 833 So. 2d at 829-31.

3. The Supreme Court of Florida granted review. In a splinted decision involving three dissenting justices and two special concurrences, the court affirmed.

A four-member majority held that the police conduct at issue here did not violate the Fourth Amendment because (1) the police did not falsely claim legal authority to conduct the search, *see Bumper v. North Carolina*, 391 U.S. 543, 550 (1968); and (2) the police did not falsely promise a benefit in exchange for consent to search, *see Lynumn v. Illinois*, 372 U.S. 528, 529-34 (1963); *Spano v. New York*, 360 U.S. 315, 320-23 (1959). Accordingly, under a totality-of-the-circumstances approach, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the court held that the search was reasonable under the Fourth Amendment.[1]

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[1] The court distinguished rather than disapproved the Fourth District's decision in *McCord*. It found that "being accused of burglary does not entail the same pressure as being accused of rape," and concluded that the pressure on the defendant on the defendant in *McCord* was greater than that placed on Wyche.

Three of the seven justices dissented in two separate opinions. Justice Anstead, joined by Justices Lewis and Pariente, dissented on the grounds that although the police may engage in deceptive conduct concerning the circumstances under investigation in order to obtain consent to search, they may not, as here, fabricate the existence of an altogether different crime. (App. 40a-41a.) Relying on decisions from several other jurisdictions, including *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989), and *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006), he concluded that "consent is not voluntary where the government obtains it by intentionally and falsely informing a person in custody that the person is suspected of a completely fabricated crime." (App. 42a.)

Justice Lewis wrote a separate dissenting opinion, which Justices Anstead and Pariente joined. Also relying on *Krause*, 206 S.W.3d at 922, he would have held that "extrinsic" lies regarding facts outside the scope of the crime under investigation generally render consent to search invalid. (App. 82a-84a.) Justice Lewis explained that the false hope of exoneration is inherently coercive and cannot result in valid consent. (*Id.* 89a.)

In addition to those dissents, two justices of the four-person majority delivered a special concurrence to express "serious reservations" about their decision. Justice Bell, writing for himself and Justice Quince, wrote that he was "disturbed by the level of intentional police misrepresentation in this case." (*Id.* 19a.) "Such tactics, if they were to become commonplace,

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(App. 18a.) As a result, the court found Wyche's consent to be voluntary and the *McCord* defendant's involuntary.

would destroy the integrity of the criminal justice system." (*Id.*) Justice Bell explained that he and Justice Quince had voted for the majority opinion only because they felt constrained by this Court's precedent. Only two justices of the seven-justice court affirmed without these reservations.

REASONS FOR GRANTING THE WRIT

I. LOWER COURTS ARE DEEPLY DIVIDED OVER WHETHER POLICE MAY GIVE A FALSE PURPOSE FOR A SEARCH IN ORDER TO OBTAIN CONSENT.

State and federal appellate courts are deeply divided on the question whether (and, if so, under what circumstances) law enforcement officers may obtain consent to search by lying about the purpose of the search. On one hand, some state and federal appellate courts have held that a search following such consent is unreasonable. On the other hand, other courts, like the court below, have applied a totality of the circumstances approach in holding that such police deception is permissible under the Fourth Amendment. This Court's intervention is needed to resolve this conflict and provide guidance to lower courts, the police, and citizens alike regarding this fundamental and recurring issue of Fourth Amendment law.

1. On one side of the conflict lie federal and state court decisions holding that a search violates the Fourth Amendment if it is based solely on consent obtained after officers have deceived an individual as to the search's purpose. These courts have concluded that police deception as to the purpose of the search either renders the consent involuntary under *Schneckloth*, 412 U.S. 218, or is unreasonable within

the Fourth Amendment in any event because it exceeds the outer bounds of acceptable police conduct.

For example, over thirty years ago, in *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974), the Ninth Circuit held that consent to enter a locked office building was invalid under the Fourth Amendment when police falsely told an occupant at the door that they needed permission to investigate a report of a burglary in the building. The court held that "[b]efore a person can be deemed to have 'knowingly' consented, he must be *aware of the purpose* for which the agent is seeking entry. A ruse entry, by its very nature, runs contra to the concept of an intelligent consent or waiver." *Id.* at 1135 n.4 (citation omitted and emphasis added). The court explained that "[t]o hold otherwise is to grant the agent a license to go from house to house employing ruse entries in violation of the right of privacy of the respective occupants." *Id.* at 1136. The Ninth Circuit has applied this constitutional holding in later cases. *See, e.g., United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) ("A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.").

Similarly, in *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989), the Eighth Circuit affirmed the suppression of evidence in a case involving a search in which postal inspectors tricked the defendant into disclosing the contents of his wallet by claiming they were investigating the disappearance of Canadian money. In fact, they were hoping to find that the defendant possessed marked American currency and a bearer check the inspectors had placed in mail trays at the bank where the defendant worked. *Id.* at 369. The

officers obtained consent and discovered the marked bills and check. The district court suppressed the evidence as the product of an improper search. *Id.* The Eighth Circuit affirmed, finding that the government had failed to meet its burden of establishing that the consent was freely and voluntarily given when provided in response to the deception by police. *Id.* at 375. *See also United States v. Montes-Reyes*, 547 F. Supp. 2d 281, 291 (S.D.N.Y. 2008) (holding that consent was invalidly obtained by police officers who claimed to be looking for a missing girl when they were actually looking for narcotics).

A number of state courts have likewise held that a search justified solely by consent – when that consent is obtained through police deception as to the search's true purpose – is unreasonable under the Fourth Amendment.

The Supreme Court of Kentucky, for example, recently invalidated a search when the consent was based on a ruse involving the alleged rape of a child. *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006), *cert denied*, 127 S.Ct. 2975 (2007). In *Krause*, police officers arrived at the defendant's house at 4:00 a.m. to investigate the sale of drugs. Contrary to their actual purpose, they informed the defendant that a young girl had recently been raped, and that they needed to look around the house in order to determine if it was the place she had described to the police. The court held that the search was unreasonable because the police "exploited a citizen's civic desire to assist police in their official duties for the express purpose of incriminating that citizen." *Id.* at 927. The ruse "simply crossed the line of civilized notions of justice." *Id.*

The Supreme Court of Rhode Island likewise reversed a conviction when police obtained entry to a house with the intent of arresting one of the occupants because they failed to disclose their true purpose in entering, saying only that "the police wanted him for an investigation." *State v. Bailey*, 417 A.2d 915, 917 (R.I. 1980). The court explained that the "notion of a free and voluntary consent necessarily implies that the person knows what it is he is allowing the police to do." *Id.* at 919. The Supreme Court of Georgia reached a similar conclusion when it invalidated the defendant's consent to provide a urine sample after police told him that the test results would be used only for determining the amount of his bond, but then used the results to secure his conviction for possession of cocaine. *Beasley v. State*, 419 S.E.2d 92, 94 (Ga. 1992).

State intermediate appellate courts have reached similar conclusions. The Appellate Court of Illinois, for example, also affirmed a suppression order in a case in which the police obtained entry into a house to search for drugs by falsely representing that they were following up on a robbery previously reported by the occupants. *People v. Daughtrey*, 161 Ill. App. 3d 394, 395-97 (1987). It explained that such police conduct "is so unfair as to be coercive and renders the consent invalid." *Id.* at 400.

The Court of Appeals of Washington also reversed a conviction in a case in which police obtained consent to enter a house by failing to disclose their purpose of arresting one of the occupants, saying instead that they just "wanted to get his side of the story." *State v. McCrorey*, 851 P.2d 1234, 1236 (Wash. Ct. App. 1993). That court reasoned that "[m]embers of the public should be able to safely rely on the representations of government agents acting in their official capacity"

and concluded that "police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given." *Id.* at 1240.

Other state intermediate appellate court decisions are in accord. *See, e.g., Reyes*, 83 Cal. App. 4th at 12-13 (finding consent invalid when police convinced the defendant to leave his apartment by telling him they had just hit his truck); *Perkins v. State*, 574 A.2d 356, 360 (Md. App. 1990) (finding consent to enter invalid when police falsely informed the defendant they were at his room to investigate a noise complaint); *State v. Nereson*, C3-01-1707, 2002 Minn. App. LEXIS 459, at *11 (Apr. 30, 2002) (relying on *State v. Schweich*, 414 N.W.2d 227, 230 (Minn. App. 1987), to hold that, "[i]f police officers misrepresent their purpose to obtain consent to search, any consent can be invalidated"); *Commonwealth v. Haynes*, 577 A.2d 564 (Pa. Super. 1990) (holding murder suspect improperly seized when asked to come to police station to clear up bench warrant over which police had no jurisdiction).

2. By contrast, other state and federal courts have held, like the court below, that police deception as to the true purpose of a search is permissible under the Fourth Amendment. In *United States v. Andrews*, 746 F.2d 247 (5th Cir. 1984), for example, the Fifth Circuit considered a case in which federal agents detained the defendant during a lawful search of a hotel room. In response to questioning by the agents, the defendant revealed he owned two guns, which were both at his house in Corsicana, Texas. The defendant said that one of those guns was a sawed-off shotgun of legal length. One of the agents told the defendant that a person fitting his description had been connected to various robberies in which a shotgun was employed

and asked to inspect the gun in order to exclude the defendant as a suspect. The agent's true purpose in asking to inspect the shotguns was to seize the gun and to charge the defendant with the crime of illegal possession of a firearm by a felon. When presented with the weapons, the agent seized them and the defendant was indicted for illegal possession of firearms. *Id.* at 247-48. The court held that the defendant's consent to search was valid, despite his belief that he was exonerating himself from the fabricated armed robberies. *Id.* at 249. Though the court took the misrepresentation into account as a factor to be considered in evaluating the circumstances, it held that the deception differed from a false promise and was acceptable police conduct. *Id.* at 250. Accordingly, the court upheld the conviction.[2]

In *People v. Zamora*, 940 P.2d 939 (Colo. Ct. App. 1996), the Court of Appeals of Colorado similarly approved the search of the defendant's apartment in a case in which the police claimed to want "a 'quick look' at the layout of the apartment to aid in their investigation of a domestic dispute at an adjacent apartment." *Id.* at 941. In fact, the police intended to examine the apartment to determine whether it matched the description given by a 13-year-old girl who was sexually assaulted. The court determined that, although misled as to the crime under investigation, the suspect was aware that the officers wished to view the layout of his apartment and therefore consented as a product of his own free will. *Id.* at 942.

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[2] The court noted that in the past it had invalidated several searches on the basis of police fabrication of an unrelated crime, but that those cases were undermined by the Supreme Court's intervening decision in *Schneckloth*. *Andrews*, 746 F.2d at 250.

3. Commentators have likewise not only acknowledged this conflict in the lower courts but have themselves disagreed on the constitutionality of the kind of search at issue in this case. *Compare* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(n) (4th ed. 2004) ("Nor can it be said that this particular type of deception, misrepresentation of the crime under investigation by one known to be a police officer, is as threatening to the general public's feelings of security and privacy as certain other misrepresentations . . . ."), *with* John Wesley Hall, Jr., *Search and Seizure*, § 8.3, at 488 (3d ed. 2000) ("[T]he police well know that too many innocent citizens will give up their rights and consent to a search not knowing they have a right to refuse and thinking that 'I have nothing to hide so why not get this over with and go on?'"); *See also* Friedman, *supra*, at 340 ("Courts are split on this question.").

II. THE DECISION BELOW IS INCORRECT UNDER THE FOURTH AMENDMENT.

The decision below is also incorrect on the merits. The use of deception to obtain consent to search is invalid under the Fourth Amendment for two reasons. First, the consent provided under such circumstances is not "voluntary" under *Schneckloth*. Indeed, police deception as to the true purpose of a search is expressly intended to trick an individual into surrendering constitutional rights he or she might otherwise exercise. Second, police deception as to the true purpose of a search is unreasonable under the Fourth Amendment in any event. Innocent individuals, seeking either to assist the police or exonerate themselves from suspicion will frequently provide "consent" to search when presented with a fabricated crime or other false purpose for a search.

The Fourth Amendment simply does not countenance that level of intentional police misconduct in securing consent to search.

1. In order to justify the lawfulness of a search based solely on consent, the government has the burden to prove that the consent "was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Consent must be a product of "free and unconstrained choice," *Schneckloth*, 412 U.S. at 225, and is not freely given if it is "the result of duress or coercion, express or implied." *Id.* at 248.

This Court's precedents show that consent obtained following police deception as to the purpose of a search is not freely and voluntarily given, but is instead the result of coercion. In *Gouled v. United States*, 255 U.S. 298 (1921), the Court held that a search of a suspect's home by a government agent was unconstitutional when the agent, though intending to find and seize incriminating papers, gained entrance on the fraudulent basis of a social visit. The Court held that the deception amounted to coercion:

> "[I]t is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion . . . . [T]he search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

Id. at 305-06. The Court has applied this principle since *Schneckloth* to find that the coercive nature of police trickery may vitiate consent. For example, the Court has held consent to be involuntary when police provide the impression that consent cannot be lawfully

withheld, such as when police falsely claim to have a warrant. *Bumper*, 391 U.S. at 550.

The same result follows here. When an individual consents to a search based on the false assertions of police, he is ignorant of the true nature of his acquiescence and compelled by false assurances and pressure. That is particularly true where, as here, a person consents to a search on the basis of a fabricated crime. The implicit and *false* promise of official exoneration will almost always drive innocent citizens to consent to a search under circumstances like those at issue here. *See, e.g.*, *United States v. Montes-Reyes*, 547 F. Supp. 2d 281, 291 (S.D.N.Y. 2008) (a person "would have . . . every reason to believe that his failure to consent to the search would hinder or delay the efforts to resolve" the matter under investigation).

In reaching the contrary conclusion, the courts agreeing with *Wyche* rely heavily on this Court's decision in *Lewis v. United States*, 385 U.S. 206, 209 (1966). But *Lewis* involved the distinct question of the constitutionality of evidence obtained as the result of undercover police operations. In *Lewis*, the Court held admissible evidence recovered by an undercover officer because the suspect's purpose of allowing the officer into his home was to execute a felonious sale of narcotics, regardless of the officer's deception as to his identity. *Id.* at 210; *see also Hoffa v. United States*, 385 U.S. 293, 301-02 (1966) (holding that a defendant's statements made to an informant were admissible even though the informant lied about his identity). That type of deception is not coercive and does not overcome an individual's free will in choosing to engage in an illegal transaction. "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the